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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 974

LESTER KRAFT AND ALVA C. KRAFT,
d/b/a NATIONAL ART ACADEMY, *Petitioners*,

v.

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA,
Respondent.

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Did not the court below correctly hold that the administrative record establishes that the Board of Education of the District of Columbia committed no error of law, that its findings are supported by substantial evidence, and that its decision to revoke petitioners' license to confer the degree of Bachelor of Fine Arts is not arbitrary or capricious?

COUNTER-STATEMENT OF THE CASE

In 1929, the Congress provided that no educational institution operating in the District of Columbia should thereafter undertake to confer any degree unless licensed by the Board of Education of the District of Columbia (hereinafter "the Board") upon satisfactory evidence that it met certain prescribed criteria. Act of March 2, 1929, 45 Stat. 1504, ch. 529, D. C. Code, 1961, § 29-415. The statute provided also for the revocation of a license once issued for noncompliance with the criteria for licensure but made no express provision for periodic review by the Board of an institution's qualifications for continued licensure. Act of March 2, 1929, *supra*, D. C. Code, 1961, § 29-417.

The owners of the National Art School, an unincorporated educational institution in the District of Columbia, were granted a license in 1951 to confer the degree of Bachelor of Fine Arts (J. A. 18-19, 31). Petitioners purchased the National Art School in 1958 and changed its name to the National Art Academy (hereinafter "the Academy") (J. A. 1, 8, 31).

In 1960, the Board adopted a "Statement of Policy" in which it declared, *inter alia*, that:

> "It shall be the policy of the Board of Education that institutions licensed by the Board to confer degrees shall be evaluated every five years by a committee appointed by the Superintendent." (J.A. 19-23.)

The Board's Committee on Degree Conferring Institutions (hereinafter "the Committee") thereafter visited the Academy, examined and evaluated its operations and facilities, and submitted to the Board, on November 21, 1962, a report setting forth the serious deficiencies it had found in the Academy's curriculum, admission policies, faculty, library, and record system, together with detailed recommendations as to the manner in which such deficiencies could be corrected (J. A. 23-27).

Upon petitioners' representation that they would undertake to comply with each of the Committee's recommendations, action on the revocation of petitioners' license was postponed until the fall of 1963 and the Committee was instructed by the Board to re-examine and re-evaluate the Academy's operations and facilities as of that time (J. A. 28-31, 67).

On November 20, 1963, the Committee submitted to the Board a detailed report in which it set forth the serious deficiencies it found to still exist in the Academy's curriculum, admission policies, faculty, library, and record system (J. A. 35-44). In the opinion of the Committee, these deficiencies established that the Academy did not comply with, and was unlikely in the future to comply with, the requirements for licensure contained in D. C. Code, 1961, § 29-415, paragraphs 2, 3, and 4, and required the revocation of petitioners' license (J. A. 43-44).

At petitioners' request, a hearing was had before the Board in March and April 1964. The evidence adduced at the four-day hearing established, *inter alia,* that the Academy is owned by petitioners (husband and wife) and operated by petitioner Lester Kraft (J. A. 149). No member of the faculty or staff of the Academy has "any background at all in educational courses, either in teaching or school administration" (J. A. 149). The Academy's entire curriculum consists of three courses: Interior Design, Advertsing Art, and Fine Arts in Illustration (J. A. 135). There are 29 students enrolled in the Interior Design course; 34 in the Advertising Art course; and none in the Fine Arts in Illustration course (J. A. 135, 152.) The total student body consists of 46 students (J. A. 87). The faculty of the Academy consists of four or five part-time instructors, at least three of whom have no degree of any kind (J. A. 97-98, 143). The records of the Academy do not indicate that many of the degree candidates have graduated from high school, nor do they indicate the quantity or quality of work completed or the quantity or quality of work to be completed (J. A. 89-97, 101-102, 110-113, 118-119). The Academy's

library consists of less than 400 volumes, the subject matter of which is quite limited (J. A. 78-87, 149).

On the basis of the evidence adduced at the hearing, the Board made findings of fact, including a specific finding that the Academy's operations and facilities did not comply with the provisions of D. C. Code, 1961, § 29-415:

> "2. That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree * * *.
>
> "3 That applicants for said degree possess the usual high-school qualifications at the time of their candidacy therefor.
>
> "4. That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment." (J. A. 32-33.)

The Board, accordingly, on July 27, 1964, revoked petitioners' license to confer the degree of Bachelor of Fine Arts (J. A. 33-34).

Alleging that the action of the Board in revoking their license was not supported by substantial evidence in the Administrative record, was violative of constitutional and statutory requirements, and was otherwise unlawful, petitioners brought in the United States District Court for the District of Columbia a civil action to compel the restoration of their license (J. A. 1-7).

At trial, the entire administrative record was received in evidence (J. A. 16). Upon its review, the court concluded that the Board had committed no error of law, that its findings were supported by substantial evidence, and that its decision to revoke petitioners' license was neither arbitrary nor capricious (J. A. 11-17). The court, accordingly, entered judgement in favor of the Board and dismissed the complaint (J. A. 11).

Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the judgement of the District Court was unanimously affirmed by a *per curiam* order (Petitioners' Appendix, 1a).

REASON WHY WRIT SHOULD BE DENIED

No question of substance is presented for review.

Contrary to the command of the Court's Rule 23(h), the petition for a writ of certiorari does not contain "[a] direct and concise argument amplifying the reasons relied on for the allowance of the writ." Indeed, petitioners nowhere indicate which, if any, of the "special and important reasons" set forth in Rule 19 they believe justify the granting of the petition. Rather, the petition is directed to what petitioners conceive to be the merits of each of the numerous issues presented to the court below and unanimously resolved against them.

Petitioners' principal complaint appears to be that the Court of Appeals did not believe any of the issues raised by them were of sufficient substance or importance to warrant discussion in an opinion. Such issues were not, however as petitioners argue, left undecided. Inherent in the judgement of the Court of Appeals is the resolution of every question necessary to support the judgement of the trial court.

The questions presented by petitioners turn on the construction of a statute of purely local application and significance. This Court has many times said that it will not ordinarily review decisions of the courts of the District of Columbia which arise out of the enforcement of laws limited in their application to the District of Columbia. See, e.g., *American Security and Trust Company* v. *Commissioners of the District of Columbia,* 224 U. S. 491; *United Security Company* v. *American Fruit Product Company,* 238 U. S. 140, 141,-142; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285: *District of Columbia* v. *Pace,* 320 U. S. 698, 702.

The only constitutional question arises from petitioners' contention that D. C. Code, 1961, § 29-415, violates the due

process clause of the Fifth Amendment because it reposes in the Board arbitrary power to grant or withhold licenses. This contention is based on that portion of the statute which provides that, before licensing an institution to confer any degree, the Board "may require satisfactory evidence" that it complies with certain prescribed criteria. Petitioners argue that the word "may," as here used, is discretionary and that the Board is therefore empowered to require "satisfactory evidence" from some applicants for licensure and not to require it from others.

In rejecting petitioners' contention, the District Court held that, depending on the context in which used and the intention of the Congress as reflected in the statute and its legislative history, "the word 'may' can be at times construed to mean 'shall,' just as the word 'shall' may be construed to mean 'may' " (J. A. 15-16). The court then concluded that the word "may," as here used, has "a mandatory significance" which makes it incumbent upon the Board to require, in all cases, "satisfactory evidence" before granting a license (J. A. 16).

It is undisputed that the Board has at all times construed the word "may," as here used, to be mandatory. And the legislative history of the statute clearly reflects that it was the intention of the Congress that "satisfactory evidence" be required by the Board in all cases. See Senate Report No. 611 which accompanied S. 2366 of the 70th Congress, the bill enacted on March 2, 1929, as the statute here involved.

The affirmation by the Court of Appeals of the District Court's ruling is thus eminently correct for, as stated in 1 Am. Jur. 2d, *Administrative Law*, § 46:

> "It is a general rule that permissive words used in statutes conferring power and authority upon administrative agencies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals. [Footnote omitted.]"

CONCLUSION

For these reasons and others apparent in the record, it is respectfully submitted that petitioners have presented no substantial and important question calling for review by this Court and that the petition for a writ of certiorari should, therefore, be denied.

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